

1 JEFFREY M. HAHN (admitted pro hac vice)  
2 hahn.jeffrey.m@dol.gov  
3 DAVID M. ELLIS, DC SBN 976985 (pro hac vice application pending)  
4 ellis.david.m@dol.gov  
5 Office of the Solicitor  
6 Plan Benefits Security Division  
7 United States Department of Labor  
8 P.O. Box 1914  
9 Washington, DC 20013  
10 Tel: (202) 693-5600; Fax: (202) 693-5610

11 Attorneys for Plaintiff SETH D. HARRIS  
12 Acting Secretary of Labor, United States Department of Labor

13 UNITED STATES DISTRICT COURT FOR THE  
14 CENTRAL DISTRICT OF CALIFORNIA

15 **SETH D. HARRIS**<sup>1</sup>, Acting Secretary, ) Case No. EDCV12-1648-United  
16 States Department of Labor, ) R (DTBx)  
17 )  
18 Plaintiff, ) **SECRETARY'S REPLY TO**  
19 ) **DEFENDANT GREATBANC'S**  
20 ) **OPPOSITION TO**  
21 v. ) **MOTION TO STRIKE**  
22 ) **AFFIRMATIVE DEFENSES**  
23 **GREATBANC TRUST COMPANY,** )  
24 et al., )  
25 )  
26 Defendants. ) Date: March 4, 2013  
27 ) Time: 10:00 a.m.  
28 ) Hon. Manuel L. Real  
\_\_\_\_\_ ) Courtroom 8  
\_\_\_\_\_

29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

<sup>1</sup> This substitution is made pursuant to Fed. R. Civ. P. 25(d) following the resignation of Hilda L. Solis and the appointment of Seth D. Harris as the Acting Secretary of Labor.

## TABLE OF CONTENTS

|   |    |
|---|----|
| I. <u>Twombly's</u> and <u>Iqbal's</u> Heightened Pleading Standards Apply to Affirmative Defenses.....                                   | 1  |
| II. GreatBanc's Implausible Statute of Limitations Affirmative Defense Should Be Stricken .....   | 5  |
| III. GreatBanc's Failure to State a Claim Affirmative Defense is Not Properly Pled .....  | 6  |
| IV. GreatBanc's Third Affirmative Defense Purporting to Reserve the Right to Add Additional Affirmative Defenses is Improperly Pled ..... | 9  |
| V. CONCLUSION .....   | 12 |
| VI. CERTIFICATE OF SERVICE.....   | 13 |

## TABLE OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| <u>Ashcroft v. Iqbal</u> , 556 U.S. 662, 129 S.Ct. 1937 (2009) .....               | 1          |
| <u>Barnes v. AT &amp; T Pension Ben. Plan-Nonbargained Program</u> , 718 F. Supp.  |            |
| 2d 1167, 1172 (N.D. Cal. 2010) .....   | 2, 3, 4, 9 |
| <u>Bell Atlantic Corp. v. Twombly</u> , 550 U.S. 544, 127 S. Ct. 1955 (2007) ..... | 1          |
| <u>Dion v. Fulton Friedman &amp; Gullace LLP</u> , 11-2727 SC, 2012 WL 160221      |            |
| (N.D. Cal. Jan. 17, 2012) .....  | 2          |
| <u>Ear v. Empire Collection Authorities, Inc.</u> , 2012 WL 3249514 (N.D. Cal.     |            |
| Aug. 7, 2012) .....  | 5          |
| <u>Fantasy, Inc. v. Fogerty</u> , 984 F.2d 1524 (9th Cir. 1993) .....              | 4, 8, 10   |
| <u>Gessele v. Jack in the Box, Inc.</u> , 3:10-cv-960-ST, 2011 WL 3881039 (D. Or.  |            |
| Sept. 2, 2011) .....   | 6          |
| <u>Gonzalez v. Heritage Pac. Fin., LLC</u> , 2:12-CV-01816-ODW, 2012 WL            |            |
| 3263749 (C.D. Cal. Aug. 8, 2012) .....   | 1          |
| <u>Griffin v. Gomez</u> , C 98-21038 JW (NJV), 2010 WL 4704448 (N.D. Cal.          |            |
| Nov. 12, 2010) .....   | 10         |
| <u>Hayne v. Green Ford Sales, Inc.</u> , 263 F.R.D. 647 (D. Kan. 2009) .....       | 2, 4       |
| <u>J &amp; J Sports Productions, Inc. v. Delgado</u> , CIV. 2:10-2517 WBS, 2011 WL |            |
| 219594 (E.D. Cal. Jan. 19, 2011) .....   | 8          |
| <u>J &amp; J Sports Productions, Inc. v. Montanez</u> , 1:10-CV-01693-AWI, 2010 WL |            |
| 5279907 (E.D. Cal. Dec. 13, 2010) .....  | 8          |
| <u>Joe Hand Promotions, Inc. v. Alvarado</u> , 1:10-CV-00907 LJO, 2010 WL          |            |
| 4746165 (E.D. Cal. Nov. 16, 2010) .....  | 9          |
| <u>Kabushiki Kaisha Stone Corp. v. Affliction, Inc.</u> , C 09-2742 RS, 2010 WL    |            |
| 890018 (N.D. Cal. Mar. 8, 2010) .....  | 10         |
| <u>People v. Classic Woodworking LLC</u> , C-04-3133 MMC, 2005 WL 645592           |            |
| (N.D. Cal. Mar. 4, 2005) .....   | 7          |

|    |   |      |
|----|---|------|
| 1  | <u>Perez v. Gordon &amp; Wong Law Group, P.C.</u> , 11-CV-03323-LHK, 2012 WL      |      |
| 2  | 1029425 (N.D. Cal. Mar. 26, 2012).....  | 3, 4 |
| 3  | <u>Quintana v. Baca</u> , 233 F.R.D. 562 (C.D. Cal. 2005) .....                   | 6, 8 |
| 4  | <u>Renalds v. S.R.G. Rest. Group</u> , 119 F.Supp.2d 800 (N.D. Ill. 2000).....    | 7    |
| 5  | <u>Shinew v. Wszola</u> , CIV.A. 08-14256, 2009 WL 1076279 (E.D. Mich. 2009) 4    |      |
| 6  | <u>Sidney–Vinstein v. A.H. Robins Co.</u> , 697 F.2d 880 (9th Cir. 1983).....     | 6    |
| 7  | <u>Solis v. Couturier</u> , 208CV02732RRBGGH, 2009 WL 2022343 (E.D. Cal.          |      |
| 8  | July 8, 2009).....  | 7    |
| 9  | <u>Woodfield v. Bowman</u> , 193 F.3d 354 (5th Cir. 1999).....                    | 3    |
| 10 | <u>Wyshak v. City Nat'l Bank</u> , 607 F.2d 824 (9th Cir. 1979) .....             | 2, 3 |
| 11 | <u>Zivkovic v. S. California Edison Co.</u> , 302 F.3d 1080 (9th Cir. 2002) ..... | 7    |
| 12 | <b>Rules</b>  |      |
| 13 | Fed. R. Civ. P. 7(a) .....  | 8    |
| 14 | Fed. R. Civ. P. 8(a)(2).....  | 3    |
| 15 | Fed. R. Civ. P. 8(b)(1)(A).....   | 2, 3 |
| 16 | Fed. R. Civ. P. 8(c) .....  | 2    |
| 17 | Fed. R. Civ. P. 15.....   | 11   |
| 18 | <b>Other Authorities</b>  |      |
| 19 | Black's Law Dictionary (8th ed. 2004) .....                                       | 7    |
| 20 |   |      |
| 21 |   |      |
| 22 |   |      |
| 23 |   |      |
| 24 |   |      |
| 25 |   |      |
| 26 |   |      |
| 27 |   |      |
| 28 |   |      |

1 In reply to Defendant GreatBanc's Opposition to the Secretary's  
2 Motion to Strike Defendant GreatBanc's Affirmative Defenses (Dkt. 29)  
3 ("Opp."), Seth D. Harris, Acting Secretary of the United States Department  
4 of Labor ("Secretary"), respectfully makes the following points:  
5

6  
7 **I. Twombly's and Iqbal's Heightened Pleading Standards**  
8 **Apply to Affirmative Defenses**

9 The weight of the case law holds that the heightened pleading  
10 standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct.  
11 1955, 1974 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,  
12 1949 (2009), apply to affirmative defenses. To be clear, there is not yet  
13 controlling authority on this issue; neither the Supreme Court nor the Ninth  
14 Circuit has decided this question, and neither Plaintiff nor Defendant has  
15 cited to a published Central District of California decision, although there are  
16 unpublished cases from this Court reaching opposing conclusions.  
17

18 Secretary's Memorandum in Support of Motion to Strike Defendant  
19 GreatBanc's Affirmative Defenses (Dkt 24-1) ("Sec. Mem") at 5; Opp at 4.  
20

21 Nonetheless, the weight of authority in the district courts holds that the  
22 heightened pleading requirements of Iqbal/Twombly apply to affirmative  
23 defenses. Gonzalez v. Heritage Pac. Fin., LLC, 2:12-CV-01816-ODW, 2012  
24 WL 3263749, at \*1 (C.D. Cal. Aug. 8, 2012) ("The majority of district courts  
25  
26  
27  
28

1 have held that the Twombly/Iqbal pleading standard applies equally to the  
2 pleading of affirmative defenses as it does to the pleading of claims for relief  
3 in a complaint."); Dion v. Fulton Friedman & Gullace LLP, 11-2727 SC,  
4 2012 WL 160221, at \*2 (N.D. Cal. Jan. 17, 2012) ("A majority of district  
5 courts have held" that heightened pleading standards apply for affirmative  
6 defenses); Barnes v. AT & T Pension Ben. Plan-Nonbargained Program, 718  
7 F. Supp. 2d 1167, 1171-1172 (N.D. Cal. 2010) ("the vast majority of courts  
8 presented with the issue have extended Twombly's heightened pleading  
9 standard to affirmative defenses"); Hayne v. Green Ford Sales, Inc., 263  
10 F.R.D. 647, 649-50 (D. Kan. 2009) ("The majority of courts addressing the  
11 issue, however, have applied the heightened pleading standard announced in  
12 Twombly, and further clarified in Iqbal, to affirmative defenses).  
13  
14  
15  
16  
17

18 In arguing that heightened pleading standards apply to only certain  
19 portions of Rule 8, GreatBanc focuses on the language of Rule 8(c) rather  
20 than Rule 8(b)(1)(A). But Rule 8(c) simply offers a "helpful laundry list of  
21 commonly asserted affirmative defenses to emphasize that avoidances and  
22 affirmative defenses must indeed be pled to be preserved," while Rule  
23 8(b)(1)(A) provides the baseline requirements for pleading defenses. Hayne,  
24 263 F.R.D. at 650. And while GreatBanc relies heavily on the fair notice  
25 pleading standard of Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir.  
26  
27  
28

1 1979), Wyshack itself relied on the parallelism between pleading complaints  
2 and affirmative defenses when it applied the pre-Twombly/Iqbal pleading  
3 requirements to affirmative defenses. Perez v. Gordon & Wong Law Group,  
4 P.C., 11-CV-03323-LHK, 2012 WL 1029425, at \*7 (N.D. Cal. Mar. 26,  
5 2012) (citing Wyshack, 607 F.2d at 827). Thus, Twombly/Iqbal's  
6 interpretation of the pleading requirements for a complaint applies equally to  
7 the pleading requirements for an affirmative defense.  
8

9  
10  
11 Further, the pleading requirements in the Federal Rules for claims and  
12 affirmative defenses mirror each other. Woodfield v. Bowman, 193 F.3d  
13 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same  
14 pleading requirements as is the complaint"). Rule 8(a)(2) requires a pleading  
15 that states a claim for relief to be a "short and plain statement of the claim";  
16 Rule 8(b)(1)(A) requires that a party responding to a pleading "state in short  
17 and plain terms its defenses to each claim." See Barnes v. AT & T Pension  
18 Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172 (N.D. Cal.  
19 2010) ("Rule 8's requirements with respect to pleading defenses in an answer  
20 parallels the Rule's requirements for pleading claims in a complaint.").

21  
22  
23  
24  
25 Iqbal/Twombly pronounced higher pleading standards in order to  
26 effectuate "the purpose of Rule 8," which is "to give the opposing party  
27 notice of the basis for the claim sought." Id. The purpose of minimum  
28

1 pleading standards is identical for claims and defenses: "to provide enough  
2 notice to the opposing party that indeed there is some plausible, factual basis  
3 for the assertion and not simply a suggestion of possibility that it may apply  
4 to the case." Hayne, 263 F.R.D. at 650. Indeed, it "makes no sense to find  
5 that a heightened pleading standard applies to claims but not to affirmative  
6 defenses," id., as the "defendant bears the burden of proof on an affirmative  
7 defense, in the same way that the plaintiff bears the burden of proof on a  
8 claim for relief." Perez, 2012 WL 1029425, at \*7

12       The broader interest of avoiding needless discovery applies to  
13 discovery that results from both claims and defenses. See Shinew v. Wszola,  
14 CIV.A. 08-14256, 2009 WL 1076279, at \*4 (E.D. Mich. 2009) ("The  
15 Twombly decision also observed that discovery costs required to explore the  
16 factual basis for a pled claim or defense are a problem."). Unnecessary  
17 discovery resulting from spurious affirmative defenses is just as wasteful as  
18 discovery resulting from improperly pled claims. See Barnes, 718 F. Supp.  
19 2d at 1173 ("If the court were to permit legally unsustainable affirmative  
20 defenses to survive, Barnes would be required to conduct expensive and  
21 potentially unnecessary and irrelevant discovery."); see also Fantasy, Inc. v.  
22 Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510  
23 U.S. 517 (1994) ("[T]he function of a 12(f) motion to strike is to avoid the  
24  
25  
26  
27  
28



1 expenditure of time and money that must arise from litigating spurious issues  
2 by dispensing with those issues prior to trial . . ."). As such, the pleading  
3 standard for claims, which "simply calls for enough fact to raise a reasonable  
4 expectation that discovery will reveal evidence" supporting the claims,  
5 Twombly, 550 U.S. at 556, applies equally to defenses.  
6  
7

8 **II. GreatBanc's Implausible Statute of Limitations Affirmative**  
9 **Defense Should Be Stricken**

10 Defendant does not plead enough facts to raise a reasonable  
11 expectation that discovery will reveal evidence supporting its statute of  
12 limitations defense. By GreatBanc's logic, simply asserting that a statute of  
13 limitations exists is sufficient to meet pleading standards. Opp at 8-9. But  
14 the empty citation to a statute vitiates the requirements that parties receive  
15 fair notice of the claims or defenses at issue in litigation, and that the claim or  
16 defense raise a reasonable expectation that discovery will result in further  
17 evidence supporting its assertion. See Ear v. Empire Collection Authorities,  
18 Inc., 2012 WL 3249514, at \*1 (N.D. Cal. Aug. 7, 2012) (striking statute of  
19 limitations affirmative defense where suit was filed within limitations  
20 period).  
21  
22  
23  
24

25 In this case in particular, GreatBanc is a signatory to an agreement  
26 tolling the statute of limitations until a date after the Complaint was filed.  
27  
28

1 Sec. Mem. at 8-9; GreatBanc's Answer at 36-37, First Affirmative Defense at  
 2 ¶ 3 (Dkt. No. 21). The undisputed existence of this tolling agreement  
 3 between the parties renders GreatBanc's statute of limitations affirmative  
 4 defense spurious and implausible. Discovery that will necessarily result from  
 5 this implausible affirmative defense will be a waste of time and resources for  
 6 both parties. As such, this Court should strike this improper affirmative  
 7 defense "to avoid the expenditure of time and money" associated with  
 8 litigating "spurious issues." Sidney–Vinstein v. A.H. Robins Co., 697 F.2d  
 9 880, 885 (9th Cir. 1983).

### 14 **III. GreatBanc's Failure to State a Claim Affirmative Defense is** 15 **Not Properly Pled**

16 Regardless of whether Iqbal/Twombly's heightened pleading standards  
 17 apply to affirmative defenses, Defendant's Second Affirmative Defense of  
 18 failure to state a claim is not a proper affirmative defense. An affirmative  
 19 defense will "defeat the plaintiff's claim even where the plaintiff has stated a  
 20 prima facie case for recovery under the applicable law." Quintana v. Baca,  
 21 233 F.R.D. 562, 564 (C.D. Cal. 2005); accord Gessele v. Jack in the Box,  
 22 Inc., 3:10-cv-960-ST, 2011 WL 3881039, at \*2 (D. Or. Sept. 2, 2011)  
 23 ("[A]n affirmative defense admits the allegations in the complaint, but avoids  
 24 liability with new allegations of excuse, justification, or other negating  
 25  
 26  
 27  
 28

1 matters ..."); People v. Classic Woodworking LLC, C-04-3133 MMC, 2005  
 2 WL 645592, at \*5 (N.D. Cal. Mar. 4, 2005) (citing Black's Law Dictionary  
 3 451 (8th ed. 2004) for the proposition that "an 'affirmative defense' assumes  
 4 the truth of the opposing parties' allegations"). By contrast, "[a] defense  
 5 which demonstrates that plaintiff has not met its burden of proof is not an  
 6 affirmative defense." Zivkovic v. S. California Edison Co., 302 F.3d 1080,  
 7 1088 (9th Cir. 2002).

8 Courts "should strike affirmative defenses that are clearly mistitled or  
 9 redundant, for example if they raise matters already raised in the defendant's  
 10 denial." Renalds v. S.R.G. Rest. Group, 119 F.Supp.2d 800, 802 (N.D. Ill.  
 11 2000); see also Figueroa v. Marshalls of CA, LLC, CV11-06813-RGK SPX,  
 12 2012 WL 1424400, at \*3 (C.D. Cal. Apr. 23, 2012) (striking affirmative  
 13 defense that "is merely a denial of Plaintiff's prima facie case, and as such is  
 14 improperly raised as an affirmative defense"); Solis v. Couturier,  
 15 208CV02732RRBGGH, 2009 WL 2022343, at \*3 (E.D. Cal. July 8, 2009)  
 16 (striking affirmative defense that was "merely a restatement of Couturier's  
 17 denial of liability, or an assertion that the Secretary cannot prove the  
 18 elements of her claim."). As GreatBanc's Second Affirmative Defense  
 19 necessarily denies the truth of the allegations in the complaint — which  
 20 specifically assert two claims of relief, Complaint ¶¶ 65-76 — Defendant's

1 Second Affirmative Defense is not properly pled under any applicable  
2 standard. Quintana, 233 F.R.D. at 264.

3  
4 GreatBanc justifies this improper defense by citing a case from the  
5 District Court of Oregon for the proposition that failure to state a claim may  
6 be raised in a responsive pleading under Rule 7(a). Opp at 8. But  
7  
8 GreatBanc's Second Affirmative Defense is redundant, given that GreatBanc  
9 has already asserted this point through its denials of the claims in the  
10 Complaint, GreatBanc Answer (Dkt. 21) at ¶¶ 67-76, and its Rule 12(b)(6)  
11 motion to dismiss Count II of the Complaint (Dkt. 22). This redundancy will  
12 create "delay, and confusion of the issues." Fantasy, Inc. 984 F.2d at 1528.  
13  
14

15 Further, GreatBanc's argument fails to address the overwhelming case  
16 law from this Court and other Ninth Circuit district courts that have found  
17 that failure to state a claim is not a proper affirmative defense. See, e.g.,  
18 Figueroa, 2012 WL 1424400, at \*3 ("Defendant's First Defense for failure to  
19 state a claim is appropriately brought as a motion to dismiss under Rule  
20 12(b)(6) and is not an appropriate affirmative defense."); J & J Sports  
21 Productions, Inc. v. Delgado, CIV. 2:10-2517 WBS, 2011 WL 219594, at \*2  
22 (E.D. Cal. Jan. 19, 2011) ("Failure to state a claim is not an affirmative  
23 defense."); J & J Sports Productions, Inc. v. Montanez, 1:10-CV-01693-AWI,  
24 2010 WL 5279907, at \*2 (E.D. Cal. Dec. 13, 2010) ("Failure to state a claim  
25  
26  
27  
28

1 is an assertion of a defect in Plaintiff's prima facie case, not an affirmative  
2 defense."); Joe Hand Promotions, Inc. v. Alvarado, 1:10-CV-00907 LJO,  
3 2010 WL 4746165, at \*2 (E.D. Cal. Nov. 16, 2010), rev'd on other grounds,  
4 2011 WL 201466 (E.D. Cal. Jan. 19, 2011) ("general denials of the  
5 allegations in the complaint or allegations that plaintiff cannot prove certain  
6 elements of his claim are not affirmative defenses.").

7  
8 This litigation gains nothing but distraction and confusion if  
9  
10 GreatBanc's redundant Second Affirmative Defense remains in the pleadings  
11 despite being a mere duplication of its denials. See Barnes, 718 F.Supp.2d at  
12 1173. Thus, GreatBanc's Second Affirmative Defense must be struck as  
13  
14 improperly pled.

15  
16 **IV. GreatBanc's Third Affirmative Defense Purporting to**  
17 **Reserve the Right to Add Additional Affirmative Defenses is**  
18 **Improperly Pled**

19 As noted in the Secretary's opening brief, courts routinely strike  
20 affirmative defenses that purport to reserve the right to assert additional  
21 affirmative defenses. Sec. Mem. at 11-12 (citing seven cases that have  
22 stricken reservation-of-rights affirmative defenses).  
23  
24

25 In response to this overwhelming case precedent, GreatBanc cites  
26 one Northern District of California case that did not strike a reservation-of-  
27 rights defense because the plaintiff in that case had not demonstrated  
28

1 prejudice from its inclusion. Kabushiki Kaisha Stone Corp. v. Affliction,  
2 Inc., C 09-2742 RS, 2010 WL 890018, at \*3 (N.D. Cal. Mar. 8, 2010).

3  
4 Unlike that one case, the Secretary has amply demonstrated prejudice. First,  
5 the insertion of an affirmative defense that is either duplicative or  
6 inconsistent with the Federal Rules will create "delay, and confusion of the  
7 issues." Fantasy, Inc. 984 F.2d at 1528. Further, the Secretary does not wish  
8 to suffer "the expenditure of time and money that must arise from litigating  
9 spurious issues . . . ." Sec. Mem. at 6 (citing Fantasy, Inc., 984 F.2d 1524 at  
10 1527). Instead, the Secretary aims to "streamline the ultimate resolution of  
11 the action" and avoid the "needless expenditure of time and money." Griffin  
12 v. Gomez, C 98-21038 JW (NJV), 2010 WL 4704448, at \*4 (N.D. Cal. Nov.  
13 12, 2010). Further, if this Court finds that this defense is not redundant with  
14 the Federal Rules, then the Secretary will suffer prejudice if this defense does  
15 in fact operate to "preserve rights beyond those guaranteed in the Federal  
16 Rules." Sec. Mem. at 13.

17  
18 GreatBanc has not asserted any purpose for this affirmative defense  
19 other than "highlight[ing] its intent to continue to review and analyze the  
20 underlying facts of this matter and raise additional affirmative defenses as  
21 appropriate." Opp. at 10. But any competent defendant does this in every  
22 case pursuant to Rule 15's limitations that "a party may amend its pleading  
23  
24  
25  
26  
27  
28

1 only with the opposing party's written consent or the court's leave. The court  
2 should freely give leave when justice so requires." Fed. R. Civ. P. 15. The  
3  
4 fact that GreatBanc's defense attorneys wish to state that they are doing their  
5 job does not otherwise justify an otherwise improper affirmative defense.  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **V. CONCLUSION**

2 For the reasons discussed above and to avoid the time and expense to  
3 the Secretary of conducting discovery and the unnecessary expenditure of  
4 legal and judicial resources, this Court should strike Defendant GreatBanc's  
5 Affirmative Defenses.

6 Respectfully submitted:

7  
8 Dated: February 19, 2013

9 For the Secretary:

10 M. PATRICIA SMITH  
11 Solicitor of Labor

12 TIMOTHY D. HAUSER  
13 Associate Solicitor  
14 Plan Benefits Security Division

15 RISA D. SANDLER  
16 Counsel for Fiduciary Litigation

17  
18 /s/\_\_\_\_\_  
19 JEFFREY M. HAHN  
20 Trial Attorney, DC SBN 975576  
21 DAVID M. ELLIS,  
22 Trial Attorney, DC SBN 976985  
23 Office of the Solicitor  
24 Plan Benefits Security Division  
25 U.S. Department of Labor  
26 P.O. Box 1914  
27 Washington, DC 20013  
28 Tel: (202) 693-5600  
Fax: (202) 693-5610  
hahn.jeffrey.m@dol.gov  
ellis.david.m@dol.gov  
Attorneys for Plaintiff



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing  
Secretary's Reply to Defendant GreatBanc's Opposition to Motion to Strike  
Affirmative Defenses in the above-captioned case was served on counsel of  
record via the court's ECF system.

/s/  
JEFFREY HAHN